23519

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE MISSION ROCK COMPANY. } No. 198.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This was an action in ejectment originally brought by the United States against the California Dry Dock Company to recover the possession of a tract of land lying in the Bay of San Francisco about one-half mile from shore, being a square 800 feet on each side, including the rock or island known as Mission Rock and a small adjacent rock or island, and containing 14.69 acres.

The defendant, the Mission Rock Company, having, pending the action, acquired all the right, title, and interest of the California Dry Dock Company in the premises sued for, was substituted for the original defendant. The circuit court (Beatty, judge) rendered judgment in favor of the United States. (Rec., p. 13.)

19793—03——1

Upon the findings (Rec., pp. 10–13) and judgment, the case was carried on error to the circuit court of appeals, which (Gilbert, Ross, and Morrow, circuit judges) reversed the judgment and remanded the cause with instructions to enter judgment for the plaintiff for the recovery of the possession of the two rocks or islands mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, * * * "*and as respects the remainder of the land sued for that the plaintiff take nothing*" (Opinion, Ross, J., Rec., p. 25; judgment, Rec., p. 34). From this judgment error was prosecuted by the United States to this court.

The findings of the circuit court (Rec., p. 10) are as follows:

FINDINGS. (Rec., p. 10).

I.

The defendant, Mission Rock Company, is and since a date anterior to June 6, 1900, was a corporation organized and existing under the laws of the State of California, and pending the hearing of this cause became, by virtue of a deed of grant, bargain, and sale from The California Dry Dock Company dated June 6, 1900, the owner of all the title and interest of The California Dry Dock Company in and to the premises in controversy, and thereupon entered into and now holds the possession of the same.

On request of the Mission Rock Company and proof of the fact that the said company had acquired the interest of The California Dry

Dock Company in the lands sued for and by consent of the plaintiff, this court made an order substituting the Mission Rock Company for The California Dry Dock Company as defendant, and continuing this action against said Mission Rock Company as defendant.

II.

At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than 20 and less than 40 feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause marked "Exhibit A."

III.

The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called "Mission Rock" had an area of fourteen one-hundredths ($\frac{14}{100}$) of an acre; the other had an area of one one-hundredth ($\frac{1}{100}$) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the extent that they were covered and uncovered by the flow and ebb of the tide varied from 10 to 25 feet, depending on their steepness. Both

rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland and surrounded and now surrounds them.

IV.

The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican governments.

V.

No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of section 5 of the act of July 1, 1864 (13 Stat., 332), has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

VI.

On the 13th day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

"EXECUTIVE MANSION, *January 13, 1899.*

"It is hereby ordered that Mission Island and the small island southeast thereof, designated on the official plat on file in the General

Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

"WILLIAM MCKINLEY."

VII.

On the —— day of March, 1864, the United States surveyor-general for the State of California extended the public surveyors so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

VIII.

On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor," which act was printed in the Statutes of California for the years 1870–71, at page 801, is hereby referred to and made part hereof.

The lands therein described include the lands sued for in this action. On the 11th day of July, 1872, the State of California, in conformity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain, and sale, dated May 1, 1878, purporting to convey the said lands to the California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named corporation has not since said date conveyed to any person or corporation the said lands.

IX.

The California Dry Dock Company, upon going into possession of said lands so conveyed undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about 4 acres, upon which extensive warehouses were built by it, and wharves erected for the accommodation of shipping.

Since the issuance of the State patent hereinbefore referred to, the patentee thereof up to May 1, 1878, The California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof.

23522

X.

On April 7, 1900, Col. George H. Mendell, then in charge of the Corps of Engineers of the United States Army on the Pacific coast, caused to be served on the California Dry Dock Company the following notice:

"UNITED STATES ENGINEER OFFICE,
"No. 533 KEARNY STREET,
"*San Francisco, Cal., April 7, 1890* (1900).

"Captain OLIVER ELDRIDGE,
"*President California Dry Dock Company,*
"*303 California Street, San Francisco, Cal.*

"SIR: Under the provisions of section 12 of the river and harbor act of August 11, 1888 (a copy of which is enclosed), a board of engineer officers was appointed to establish the harbor lines of San Francisco Harbor and adjacent waters. There is transmitted herewith, for your information, a map, upon which are shown the limiting lines of wharves and the line beyond which no deposits shall hereafter be made, at Mission Rock, as established by the board and approved by the Secretary of War March 24, 1890.

"Very respectfully,
"G. H. MENDELL,
"*Colonel, Corps of Engineers.*"

The limits referred to in the above letter, and delineated on the map, are in effect the limits of "Mission Rock" as improved at that time.

SUPPLEMENTAL FINDING. (Rec., p. 13.)

The title of the United States, as successor of the Mexican Republic, under the treaty of Guadalupe-Hidalgo, to the land in controversy, has not since been divested by patent or other conveyance, and the title thereto is still in the United States, unless the same passed to the State of California by virtue of the admission of the State under the act of Congress, or unless the United States relinquished title thereto under subsequent acts of Congress.

ARGUMENT.

I.

Upon the acquisition of California from Mexico, under the treaty of Guadalupe-Hidalgo (May 30, 1848; 9 Stat., 922), all the Territory then belonging to Mexico became the property of the United States, both the tide lands and the upland. Among other considerations, the United States agreed to pay Mexico $15,000,000 for this land (art. 12) and to assume and pay certain claims outstanding against Mexico (arts. 13, 14, 15).

From the lands thus acquired must, of course, be excepted the lands which Mexico, prior to the treaty, had granted or in any way disposed of. Subject to this exception, the United States became the owner of all the land in California, both the fast land and the submerged land. (*San Francisco* v. *Le Roy*, 138 U. S., 656, 671; *Knight* v. *U. S. Land Association*, 142 U. S, 161, 183.)

The tide or submerged lands the United States took in trust for the future State of California (*San Francisco* v. *Le Roy*, 138 U. S., 656, 671; *Knight* v. *U. S. Land Association*, 142 U. S., 161, 183). All the rest it held in absolute ownership.

The tide or submerged lands which the United States held in trust for the future State, and which, upon the admission of California to the United States, became in a sense the property of California, to be held and used in trust for the benefit of the people, have been repeatedly described by this court.

In *San Francisco* v. *Le Roy* (138 U. S., 656), the court, speaking by Mr. Justice Field, said (p. 671):

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide water flowed so continuously as to prevent their use and occupation. To render lands tide lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which upland is applied.

This definition was quoted with approval in *Knight* v. *U. S. Land Association* (142 U. S., 161, 186).

In all the cases I have read the lands which, under this doctrine, went to the original States when the Revolution took place, and to the subsequent States upon their admission to the Union, is *submerged* land—land under water, not land above water. The control

over the navigable waters included the ownership, in trust for the people, of the soils covered by such water.

In *Martin* v. *Waddell* (16 Peters, 367) the court speaks of the States' absolute right "to all their navigable waters and the soils under them" (p. 410).

In *Weber* v. *Board of Harbor Commissioners* (18 Wall., 57), a California case, Mr. Justice Field, speaking for the court, said (p. 65):

> Although the title to the soil under the tide waters of the bay [of San Francisco] was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over, *all soils under the tide waters* within her limits passed to the State, etc.

In *Illinois Central Railroad* v. *Illinois* (146 U. S., 387) the ownership by the State, in trust for the people, "over lands covered by tide waters" is discussed (p. 435). In another place the court speaks of such lands as "lands under navigable waters" (p. 452).

In *Shively* v. *Bowlby* (152 U. S., 1) Mr. Justice Gray, in stating his conclusions (p. 57), speaks of "lands under tide waters," and "lands flowed by the tide;" and again "in the tide waters, and lands under them;" and further on, "in navigable waters and in the soil under them."

II.

Conceding that, upon the admission of California into the Union, the State took and has since held the

23524

ownership of the tide lands, or the submerged lands, or the navigable waters with the soils under them, to be used in trust for the people in the furtherance of navigation and commerce, the island or islands known as Mission Rock remained the property of the United States, because they never had been nor are they now tide land, or submerged land, or soil under navigable waters.

> At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and *projecting above the plane of ordinary high water in the bay of San Francisco, the larger of which rose to a height of more than 20 and less than 40 feet above such high water.* Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged, and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause, marked "Exhibit A." (Finding II.)
>
> The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called "Mission Rock" had an area of fourteen one-hundredths ($\frac{14}{100}$) of an acre; the other had an area of one one-hundredth ($\frac{1}{100}$) of an acre. *These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides, to the extent that they were covered and uncovered by the flow and ebb of the tide, varied from 10 to 25 feet, depending on their steepness.* Both rocks were barren,

> without soil or water, and were of no value for purposes agricultural or mineral. *They lay at a distance of about half of a mile from the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland, and surrounded and now surrounds them.* (Finding III.)

The circuit court of appeals, which sat at San Francisco, says (Rec., p. 31):

> They (the rocks or islands mentioned) no more constitute submerged land than did the Island of Alcatraz, also situated in the Bay of San Francisco, upon which the Government has erected and now maintains important fortifications. That island, it is true, is much larger than the larger of the two islands or rocks here in controversy, the island of Alcatraz being about 600 yards long by about 260 yards in breadth, and rising to an elevation of 137 feet above the bay. Like the two islands in controversy, however, it is composed almost entirely of rock (Pacific Coast Pilot, 182). The relative size, however, of the rocks or islands does not change their legal character. Neither of them is submerged and all alike project above the surface of the bay, and do not and never did constitute any part of the submerged or tide lands which passed to the State.

In this connection it is well to point out that, as stated in the seventh finding (Rec., p. 11):

> On the —— day of March, 1864, the United States surveyor-general for the State of Cali-

fornia extended the public survey so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

The purchase of over 14 acres of submerged land surrounding these rocks or islands shows conclusively that the rocks or islands were not submerged land. The submerged land was purchased because of the location of the islands. Without the islands, the soil under the navigable waters of the Bay of San Francisco a half mile from shore would have been worthless. The submerged land was bought upon the condition that a marine railway and dry dock should be built at Mission Rock. This of itself was sufficient to show the possible use and value of this island, not as submerged land, but as "fast land," land above water, permanently fixed, and capable of a valuable commercial use. If valuable to a private individual or corporation for improvement as a site for docks and warehouses, Mission Rock was equally valuable to the United States as a site for naval, military, or commercial purposes.

Opposing counsel liken these islands to rocks embedded in the shore, which by chance lift their caps sufficiently high to be above ordinary high tide, and assert that the State might destroy them as obstructions or turn them to use as improvements to navigation. If a rocky promontory of the character of Mission Island extended into a navigable bay, the State would find some difficulty in destroying it as an obstruction without first compensating the owner for the value

of his property. If by some operation of nature, the promontory were separated from the land, so that water flowed between it and the mainland, and it became an island, such as Mission Island, it would still remain the property of the riparian owner with all the rights appurtenant to such possession.

In the case of *Commonwealth* v. *Shaw* (14 S. & R., 9 (1826), it was held that a rock just below the Fairmount Dam in the Schuylkill River, which before the construction of that dam had been a part of the mainland but as a result of the erection of the dam had become detached, surrounded by water, and dry only at low tide and a few hours before and after, did not, because of that fact, become common property upon which the people generally had a right to stand and fish, but remained the property of the owner of the mainland, from which the rock had been detached.

But Mission Island and the adjoining island are not rocks in the sense that they are huge, detached pieces of stone lying embedded in the soil of San Francisco Bay. They are rocks only in the sense that the rocky summit of a mountain, a hill, or any elevation of ground may be said to be a rock. Mission Island is the summit of a rocky elevation which at that point rises some 40 feet above high-water mark. It differs in no respect from Alcatraz or the other islands, except in size. The rocky ground surrounding Mission Island slopes away gradually to the navigable part of the bay. The distinction between a natural formation of this character, peculiarly designed for use as an island

for military, naval, or commercial purposes, and a big rock embedded in the soil of a bay, fit for nothing except to be blown up, is broad and obvious.

III.

But it is insisted that upon the admission of California, all property "above and below high water," not reserved by the United States in the act of admission, passed to the State. This is novel doctrine. It is based on the contention that if there was any land reserved under the act, it was only "public lands," meaning thereby land "subject to sale or other disposal under general laws"—citing *Newhall* v. *Sanger* (92 U. S., 761, 763). Carried to its logical conclusion, this doctrine would strip the United States of all its lands except such as were open for preemption and sale under general laws. Military reservations, military posts, forts, prisons, parks, post-offices, public buildings, public sites, and other land belonging to the United States but reserved or set aside for public purposes and therefore not open for preemption or sale under general laws, would pass to the State.

In *Leavenworth Railroad Co.* v. *United States* (92 U. S., 733) it was held that land set aside or reserved for an Indian reservation was not "public land" within the meaning of a railroad grant, the court relying upon the doctrine in *Wilcox* v. *Jackson* (13 Pet., 498), and saying (p. 745):

> We are not without authority that the general words of this grant do not include an Indian reservation. In *Wilcox* v. *Jackson* (13 Pet., 498)

> the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added, "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it."

All the authorities cited by opposing counsel with respect to the meaning of the words "public lands" only show that where Congress has provided for a grant of "public lands" to a railroad, or has thrown open "public lands" to preemption or sale, the phrase "public lands" does not include land which has been in any way reserved or appropriated by the Government to a use which naturally and reasonably takes it outside of land open to preemption or sale under general laws.

I have already referred to what the court held in the case of *Leavenworth Railroad Co.* v. *United States* (92 U. S., 733).

In *Newhall* v. *Sanger* (92 U. S., 761) it was held that lands within the boundary of an alleged Mexican or Spanish grant, which was *sub judice*, were not embraced within a grant made to a railroad company so as to be

subject to withdrawal. Said the court, speaking by Mr. Justice Davis (p. 762):

> The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present term, in *Leavenworth, etc., Railroad Co.* v. *United States* (*supra*, p. 733). We held that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves; and we confined a grant of every alternate section of "land" to such whereto complete title was absolutely vested in the United States. The acts which govern this case are more explicit and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact, that to them alone could the order withdrawing lands from preemption, private entry, and sale, apply.

So in the case of *Doolan* v. *Carr* (125 U. S., 618) the court held that land within the limit of a valid Mexican grant did not pass to the Pacific Railroad as "public lands" within the meaning of the act of Congress making the grant to that corporation.

The case of *Mann* v. *Tacoma Land Company* (153 U. S., 273) properly holds that scrip or certificates for public land which an act of Congress provided might be located upon "unoccupied and unappropriated public lands," could not be located upon tide lands. Tide

lands are not public lands in any sense, because they pass to the States; they are not the property of the United States.

I concede that the term "public lands," as used in these acts of Congress making grants of public lands, does not include lands which have been reserved for public purposes. But I submit that the act admitting California into the Union never intended, by making use of the term "public lands," to reserve for the United States only lands open to preemption or sale, and therefore released or granted to the State of California all other lands—that is, lands not open to public sale but reserved by the United States for some public use.

The act provides in the third section (9 Stat., 452) that the State of California is admitted upon the express condition that the people of the State "shall never interfere with the primary disposal of *the public lands within its limits*, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description upon *the public domain of the United States*."

The title of the United States to, and right to dispose of, the public lands shall not be impaired or questioned, and no tax of any kind shall be laid upon "the public domain of the United States." This condition protects *all* the land belonging to the United States and constituting their public domain. It covers both the public lands subject to disposition under gen-

eral law, and that portion of the public domain reserved for national use and not open to disposition under general laws. No tax or assessment is to be laid upon any land of the United States whether held for public use or for disposition; and there shall never be any interference with the disposal of the public lands open to disposition under general law, either by questioning the title of the United States or their right to dispose of such lands.

That parts of the public domain may be reserved from preemption or sale and set apart for public uses, see the opinion of the court (Field, J.) in *Grisar* v. *McDowell* (6 Wall., 363, 381). This was a California case involving the title to lands claimed to be within the pueblo limits of San Francisco, but reserved from preemption or sale and set aside for military and other public uses by orders of President Fillmore.

IV.

That the title to Mission Rock and the adjacent island never passed to the State of California and still remains in the United States, is conclusively shown by the fact that, by the act under which the defendant claims, the State of California never attempted to convey any title to it. The act (see appendix) is entitled "An act to provide for *the sale and conveyance of certain submerged lands* in the city and county of San Francisco to Henry B. Tichenor." It attempts to convey, not Mission Rock, but only the submerged land inclosed in a square measuring 800 feet on each side, surrounding Mission Rock. The island or islands included in this

square were, by clear implication, excluded from the proposed grant. This appears from a careful reading of the act. Tichenor, the grantee, is authorized to have a survey and map made, at his own expense, by the city and county surveyor of San Francisco, "*of the lands belonging to the State*," situated in said city and county and included within certain boundaries which are given. These boundaries defined a square 800 feet on each side, located in the Bay of San Francisco, a point on one side of which is 3,570 feet southeasterly from the southerly corner of Brannan and Second streets in San Francisco, "said tract of land being a square, including the rock known as Mission Rock." This survey and map is to be made by Tichenor in order *to ascertain the quantity and location "of the lands belonging to the State*," which lie within the described square. "Upon the approval of such survey by the surveyor-general, and the payment by said Tichenor to the State treasury, of the value of all the lands within said described boundaries *which shall be shown by such survey and map to lie below ordinary high-water mark*, at such rate as shall be assessed by the board of State tide commissioners per acre, * * * a patent *for said lands* shall be issued to said Tichenor, his heirs and assigns." The lands to be patented are obviously the lands to be surveyed and paid for. If the State had claimed ownership of Mission Rock and had attempted to convey it, there would have been no necessity for a survey to ascertain the quantity of submerged land within the square

described. The description of the square would have sufficed to ascertain both the quantity of land to be conveyed and its location.

An examination of the patent (printed in the appendix) confirms this. The patent contains a statement of the amount of submerged land included in the square, which is fourteen and thirty-five one-hundredths acres. The square itself contains fourteen and sixty-nine one-hundredths acres. The difference is thirty-four one-hundredths of an acre, which represents the area of Mission Rock and the adjoining island as it existed, above water, at the time of the survey. The patent is so drafted that it may be read as a conveyance of the square, including Mission Rock or excluding Mission Rock, the patent being for "the following-described lands" (describing them), "said tract of land being a square, including the rock known as Mission Rock, *and containing fourteen and thirty-five one-hundredths acres exclusive of said Rock.*" If the purpose had been to convey Mission Rock, the concluding portion would have read: "Said tract of land being a square, including the rock known as Mission Rock, and containing fourteen and sixty-nine one-hundredths acres.

But however this patent may read, it can not extend the grant made by the legislature, which is defined by the act. Under the act nothing but the submerged land, which was ascertained by the survey to contain fourteen and thirty-five one-hundredths acres, was paid for and conveyed. There is no ambiguity in the act;

but if there were, the doubt would be resolved against the grantee. All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. (*Dubuque, etc., R. R. Co.* v. *Litchfield*, 23 Howard, 66, quoted with approval in *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S., 733, 740; *Rice* v. *Railroad Co.*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.)

Or, as Mr. Justice Field puts it in the *Delaware Railroad Tax Case* (18 Wall., 206, 225):

> All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule.

V.

But it may be said, if California did not claim the ownership of Mission Rock, why was the proviso inserted that the patent for the submerged lands surrounding Mission Rock should not be issued "until said Tichenor, his heirs or assigns, shall have constructed a marine railway or dry dock at said Mission Rock?" The answer is, that the State of California held the submerged lands in the Bay of San Francisco in trust for the public and could not convey them except for use in aid of navigation and commerce. It held no absolute ownership; it could convey no absolute and

unqualified title. These submerged lands, surrounding an island in the Bay of San Francisco half a mile from shore and separated from it by navigable waters, could not be conveyed or used except in connection with the island which they surrounded. (*Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 435, 452.) The act, therefore, required the use of Mission Rock, the erection of a marine railway or dry dock at Mission Rock, and this required the grantee of the submerged land to obtain a title from the United States to Mission Rock, or the right or privilege of using it as a site for a marine railway or dry dock.

I submit that this provision requiring as a prerequisite to the issuing of the patent that a marine railway or dry dock be constructed at Mission Rock, required also, in order to validate the grant, that the grantee secure from the United States the title to Mission Rock or the right to use it as a site for a marine railway or dry dock. Mission Rock was the center and foundation stone, not simply of the grant, but of the improvement it was intended to effectuate. Without Mission Rock, and the riparian or littoral rights appurtenant to it, the grant failed; and without Mission Rock the improvements contemplated and required could neither be erected or maintained. The United States, as the owner of Mission Rock, had the right, *a property right*, to use the navigable waters surrounding the island, and for that purpose to fill in and reclaim the overflowed lands, and erect wharves, piers, and docks extending to whatever point it might deem advisable in order to

reach the desired depth of navigability. If the island had belonged to a private individual, that individual would have had the right to fill in the shallow water surrounding the island and erect docks, piers, and wharves extending to the point of navigability, subject of course to the power of the State and the paramount authority of the United States to define the harbor or dock lines. The right by the grantee of the State to reclaim the submerged lands surrounding Mission Rock being subordinate to that of the United States as the owner of the island, no title as against the United States ever passed by the patent or the grant on which it was based.

VI.

But it may be insisted, upon the authority of *Shively* v. *Bowlby* (152 U. S., 1), that, the ownership of tide or submerged lands being in the State, the State may convey such lands to a person other than the owner of the upland bordering on the tide lands; and, therefore, California had a right to convey the submerged lands to a private person although the United States owned the island. I deny that the State of California had any such unqualified ownership over the submerged lands of San Francisco Bay. It held these lands in trust for the public. It could only convey them to be used for public purposes, and the only public purposes for which these lands could be used was a purpose which required the ownership and use of Mission Rock. The State therefore had no power to convey the lands to be held distinct from Mission Rock and in opposition to the title of the United States to one of its islands.

The court will observe that the title to tide lands derived from the State of Oregon, which was upheld by this court in *Shively* v. *Bowlby* (152 U. S., 1, 53), was a title obtained only after these tide lands had been offered to the owner of the abutting upland and he had rejected the opportunity of acquiring and improving them (p. 53). The Oregon act provided that the owner of any land abutting or fronting upon, or bounded by the shore of any tide waters, should have a right to purchase the lands belonging to the State in front thereof; and that, if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase.

This was a recognition of the primary rights of the riparian or littoral owner, and of the qualified power of the State over tide lands. It was the duty of the State to look after the improvement of the shores of its navigable waters, and when it had offered to the riparian proprietor the right to improve the tide lands in front of his premises, and he refused, it was just and proper for the State to convey the tide lands to one who would improve them.

In *Stockham* v. *Browning*, 18 New Jersey Eq., 390 (1867), it is stated (p. 395):

> By the common law, as it existed in New Jersey before 1851, the owners of lands on the margin of tide waters had certain rights and privileges to the water, and in the shore in front

> of his lands, although the title was in the State. By the statute known as the wharf act, approved March 18, 1851, *the right to reclaim the shore* in front of his lands, and appropriate them to his own use, was vested in the shore owner.

Upon the point that, under the laws of New York, the power to convey lands under navigable waters only authorizes a conveyance by the State to the owners of the adjoining upland, the right or privilege to apply for and receive the conveyance from the State being *appurtenant to the upland* and not severable from such ownership, see *Blakslee Mfg. Co.* v. *Blakslee's Sons Iron Works*, 129 N. Y., 155 (1891; Andrews, J.).

VII.

In *Shively* v. *Bowlby* (152 U. S., 1) the court states (p. 48) that it is now well settled that "the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition" (citing a number of cases), and then lays down this proposition (p. 48):

> We can not doubt, therefore, that Congress has the power to make grants of land below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or *to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations* and among the several States, *or to carry out other public*

> *purposes* appropriate to the objects for which the United States hold the territory.

It is clear, therefore, that before California was admitted into the Union, the United States might have granted Mission Rock, and, along with it, the right to use the submerged land and the navigable waters covering it, which surrounded the island. It might have granted Mission Rock and the submerged land about it for use for the purposes set out in the California act relied on in this case. But the United States preferred to reserve Mission Rock for national uses. I submit that when the United States reserved Mission Rock for national uses, it also reserved the right to use the surrounding navigable waters and submerged land, for without them no national use could be made of the island. The title of the United States to Mission Rock was absolute and unqualified, and the authority of the United States over the surrounding navigable waters and submerged land was supreme, the right of the State in the interests of navigation and commerce being subordinate to that of the United States. (*United States* v. *Bellingham Bay Boom Co.*, 176 U. S., 211, 215.) Is it possible, that under this subordinate right, the State of California could deprive the United States both of the ownership of this valuable island and of the use of the navigable waters surrounding it?

In the case of *Scranton* v. *Wheeler* (179 U. S., 141), Mr. Justice Harlan, speaking for the court, said (p. 163):

> Whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights

> which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner.

I submit that here is a case where both justice and reason require that the right of the United States, as proprietor and as sovereign, in the submerged land and the navigable waters which surround one of its islands, should be asserted and maintained. Of what use to the nation is an island in a navigable bay without the use of the shores of the island and of the waters washing them? Is it possible that, owing to our divided sovereignty, the United States may own a valuable island in a great bay, and yet be utterly deprived of its use through a grant by a State legislature of the submerged lands surrounding it? If the State can grant a valid title to the land under navigable waters surrounding an island reserved by the nation as a site for military, naval, or commercial purposes, so that a separate, independent, distinct, and repugnant use of the submerged land may be made in utter disregard of the rights of the Government to the island, a wall may be built up between the island and the bay and access to the outside world completely cut off.

In many cases this court has held that a riparian owner has a right of access to the navigable waters by which his property is bounded. The owner of land

bounded by a river or bay, if denied direct access to the water, may reach it by another way; and he has egress by land to any point he may desire to reach. Not so with the owner of an island. His only means of communicating with the outside world is by the water surrounding him. If the submerged land surrounding him can be sold and filled in, he can be as thoroughly immured as if he were walled up in a dungeon.

VIII.

The United States had the absolute and unqualified ownership of Mission Island. I say unqualified because its title was not conditioned by any public use or trust, as was the State's title to the submerged land. The United States might have sold Mission Island to any individual and conveyed an absolute title. What would this absolute title to Mission Island have included? To determine this, the nature and location of the island must be considered. It was situated in the bay of San Francisco, half a mile from the shore, surrounded by navigable waters. It was not susceptible of cultivation. It contained no mineral except the rock of which it was composed. It was valuable only for use for war, naval, or commercial purposes, as a site for a fort, a coaling station, warehouses and docks, etc. To be used for any of these purposes it was necessary that access should be had from the island to the navigable waters surrounding it; and for this purpose that the contiguous submerged land should be filled up and docks and wharves constructed. This

right of access was a property right incident to the ownership of the island. If the United States had conveyed the island to a private person or corporation, that private person or corporation would have taken with the land this right of access to the navigable water. And whatever right the State held in the tide lands or submerged lands surrounding the island was subordinate and subservient to this right which went with the upland.

In *Dutton* v. *Strong*, 1 Black., 1 (1861; Clifford, J.), it was held in a case coming from Wisconsin, that a riparian proprietor on Lake Michigan has the right to construct a pier for his own exclusive use, the court (bottom p. 31, top p. 32) saying:

> Wharves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time.

In the case of *Weber* v. *Board of Harbor Commissioners*, 18 Wall., 57 (1873; Field, J.), while the court upheld the title of the State of California to the soil under the navigable waters of the bay of San Francisco (a doctrine modified in the case of *Illinois Central Railroad* v. *Illinois* (146 U. S., 387), so as to limit the State's ownership to one in trust for certain public uses) the

court explicitly recognized (p. 65) the correctness of the rule laid down in *Yates* v. *Milwaukee* (10 Wall. 497), in which Mr. Justice Miller, speaking for the court, said (p. 504):

> But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. Citing *Dutton* v. *Strong*, 1 Black, 25; *Railroad Company* v. *Schurmeir*, 7 Wall., 272.

Weber's case was distinguished, the court pointing out that he was not the proprietor of any land bordering on the shore of the sea, his land being situated nearly half a mile from what was the shore of the Bay of San Francisco at the time California was admitted into the Union, and over it the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. The inference is that if Weber had been a riparian proprietor, as he would have been if he had owned land bordering on the bay, such as Mission Rock, he would have been entitled to riparian or littoral rights incidental to the ownership of such land.

In the case of *Lake Superior Land Company* v. *Emerson*, 38 Minn., 406 (1888), it was held that the title

to the soil under the water below low-water mark in Lake Superior being in the State, the former owner of the upland abutting on the lake could not make a separate conveyance of the submerged land adjacent thereto. The only rights he had beyond low-water mark were certain riparian rights incident to the land bordering upon the lake, and these he could not sever and transfer.

In the case of *Hanford* v. *St. Paul and Duluth R. R. Company* (43 Minn., 104), this doctrine was modified, the court holding that, in certain cases, the right of the riparian proprietor to reclaim and occupy the submerged lands, although originally incident to the riparian estate, may be separated therefrom and transferred to another. At the same time the court said (bottom p. 111), "*We do not affirm that all riparian rights are thus severable. Some of them, from the very nature of things, may be incapable of separate existence.*" Following this the court says (p. 112):

> It is established beyond question in this State, and in other States as well, that the proprietor of the riparian lands may make such improvements. Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers, and wharves into the water, and up to the point of navigability, for his own private use and benefit (citing many cases). And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be

reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. *Union Depot, etc.*, v. *Brunswick*, 31 Minn., 297; *Clement* v. *Burns*, 43 N. H., 609; *Bell* v. *Gough*, 23 N. J. L., 624; *Providence Steam Engine Co.* v. *Providence Steamship Company*, 12 R. I., 348, 363.

Again (p. 114):

> This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises—the *right* itself to reclaim, improve, or occupy—is a *property* right, vested in him, and recognized and protected in the law as property. He can not be deprived of it without due process of law. It can not be taken from him, and devoted to public use, without compensation.

Again (p. 116):

> In some jurisdictions it is considered that the adjacent riparian owner actually acquires title to the lands improved and reclaimed from the water, although the title was before in the State in actual proprietorship (as in New Jersey); and that he may then convey the reclaimed premises to persons having no interest in the upland. See *New Jersey Zinc and Iron Co.* v. *Morris Canal Co.*, 44 N. J. Eq., 398; *Bell* v. *Gough*, 23 N. J. L., 624; *Goodsell* v. *Lawson*, 42 Md., 348, 362; *Nichols* v. *Lewis*, 15 Conn., 137; *Clement* v. *Burns*, 43 N. H., 609.

In the recent case of *Scranton* v. *Wheeler*, 179 U. S., 141 (1900), the court, Mr. Justice Harlan delivering

the opinion, held that the United States is not required to compensate an owner of land fronting on a public navigable river when his right of access to the navigable portion of the stream is permanently obstructed by a pier erected in the river away from the shore line under authority of Congress for the purpose of improving navigation. The pier in question was erected in Sault Ste. Marie Canal, in Michigan. The suit was one in ejectment, the owner claiming property in the submerged land on which the pier was built. As the case came from the supreme court of Michigan, and that court sustained the propriety of the form of action, the Supreme Court of the United States did not pass upon this question.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray and Mr. Justice Peckham, dissented, insisting, after an elaborate review of the authorities (to which I refer the court), that the right of access to the navigable portions of a stream is one of the incidents of ownership of abutting land; that such right is property and valuable as such, and that the United States, under its incidental power arising out of its jurisdiction over interstate commerce, can not destroy such right of access without making compensation (p. 183).

The court insisted that the right of access to the navigable portion of a stream is subordinate to the power of the General Government to cut off all access by improving the stream; on the other hand, the minority of the court insisted that the right of property is not subordinate to the right to improve the river. The river

can be improved only after compensating the riparian owner for the injury to the property taken by destroying the right of access.

IX.

The improvements made at Mission Rock were of such character that they necessarily became, when made, a part of the island itself, impossible to be separated, and therefore the property of the owner of the island. The right of the United States to recover the island consequently carries with it the right to recover the property attached to and made a part of the island. To recover what once constituted the island is not to recover the island, and it is the island alone which is of value to the United States. The ownership of an island is the ownership of a body of land bounded by shores and washed by waters. Along with the island goes the legal right to use the shores and surrounding water in connection with the island. This island (or islands) lay at a distance of about half a mile from the shore line of the bay upon which the city of San Francisco fronted. "Navigable water divided, and still divides, the lands sued for from the mainland and surrounded and now surround them." (Finding II.) The ownership of an island is not only the ownership of land, but of the shores of the land washed by water. If permanent deposits are made against these shores, changing and extending them, pushing them farther out into the water, are the new shores any less the property of the owner of the island than the old shores?

In the case of *Ledyard* v. *Ten Eyck*, 36 Barb., 102 (1862), was involved the title to a fourth of an acre of made land at the end of Cazenovia Lake, a non-navigable body of water. In the construction of a public improvement this land was filled in by the State. On one side it was claimed that it belonged to the State; on the other to the riparian owner on two grounds: first, that the body of water was non-navigable and the title of the riparian owner extended *ad medium filum aquæ;* and, second, that if the lake were navigable, and the title to the land was reserved by the State, the State would take as trustee, both for the public and for the riparian owner. The court said (p. 126):

> The State then is trustee for the public of the land under water in navigable lakes and rivers, so as to protect navigation and prevent hindrances or obstructions; on the other hand she declares herself *trustee for the riparian proprietor*, and that grants are to be made to him alone, and that they will be made not only for purposes of commerce, but when proper for the beneficial enjoyment of his adjacent lands. Then when the proper and constituted authorities of the State proceeded to deepen the outlet of the lake, and deposited the stones and earth that were removed, in the shallow water in front of and adjacent to the defendant's premises, it was a visible and public declaration that this portion of the lake could no longer be used for navigation. The defendant entered into possession, and the trusteeship of the State, both for the public and the riparian proprietor, was

> virtually at an end. It is true that no formal grant was made to the defendant. *But the land became eminently proper, and not only proper but necessary,* for the beneficial enjoyment of his adjacent premises.

Nichols v. *Lewis* (15 Conn., 137) was an action of ejectment for a parcel of land in Bridgeport, lying west of the Pequonnuck River. The dispute arose out of a description in a will, which bequeathed a parcel of land the eastern boundary of which was described as "east on the harbor at the foot of the bank." There was a steep bank on the west side of the harbor about 10 feet high. From the foot of that bank, eastwardly, the land gradually sloped away until it met the channel of the Pequonnuck River, which was the channel of the harbor. Much of this flat land was covered by all the tides of the sea; and the high spring tides extended to the foot of the bank (p. 138).

Before the institution of the suit, the defendant had filled up a portion of the mud flats between the foot of the bank and the channel of the harbor, claiming title, and that he had a right to do so, as riparian proprietor.

The court held that the plaintiff, as the owner of the low ground from the foot of the bank to the water, had a right to recover the made land, *including that once under water which was filled in by the defendant,* saying (Williams, C. J., p. 143):

> The defendant further claims, that for that part of the land filled up in the flats, the plaintiff can have no right to recover; and he says, the legal title is in the State, and not in the

plaintiffs; and if the plaintiffs have a right, this action will not lie.

As to the first objection, that the land between high and low water mark belongs to the public, this has not been denied. Nor has it been denied, that the adjoining proprietor may fill it up, or reclaim it, for the purpose of erecting wharves, not impeding navigation. The defendant, however, insists that when done, the plaintiffs are not the owners of the soil, but the State is owner. Now, although the State *prima facie* is owner of the shore on the seacoast, yet, we think, that if a wharf is legally erected thereon, it can not be maintained, that the freehold is not in the hands of the pr prietor. The law which permits him to build a wharf there, not injurious to the public interest, surely does not consider him as without interest in the soil; and wherever there is an interest in the soil this action will lie, as in the case of a boilery (*Smith* v. ———, 1 Lev., 114), or a fishery (*The King* v. *Old Alresford*, 3 Term Rep., 358). And if this action can not be supported, he is left remediless as it respects an insolvent disseizor. We think the title must be in him, subject to the right of the public to abate it, if it prove a nuisance.

The defendant further claims, that however it might be, had the plaintiffs filled up this flat, yet, as the defendant has done it, the plaintiffs can claim no right to it. Now, if the plaintiffs, as adjoining proprietors, were the individuals who alone had the right to do this, and the defendant has done it, and by means of it, he,

> if permitted to enjoy it fifteen years, would gain a complete title against the plaintiffs, *he can not, we think, complain, if the plaintiffs are allowed to treat his acts as done for them; as if a man builds on another's land, the building belongs to the owner of the land; and if the defendant chooses to put his wharf on property which the plaintiff alone can appropriate in that manner, we think the same principle will apply.*

It was also contended that an action in ejectment would not lie for the recovery of the land because the right of the plaintiff was a mere franchise, but the court held: "But the rule now is, that where the property is tangible, and an entry can be made, and possession can be delivered to the sheriff, this action will lie. * * * Here, the property is tangible; and an entry may be made, and possession given" (p. 144).

X.

It is stated in the third finding that in 1850, when California was admitted into the Union, Mission Rock had an area above high-water mark of fourteen one-hundredths of an acre, and the adjacent rock or island an area of one one-hundredth of an acre.

The survey made by Tichenor, the grantee of the State, in 1870 showed there was at that time fourteen and thirty-five one-hundredths acres of submerged land "below ordinary high-water mark" contained in the square, 800 feet on each side, which contained Mission Rock and the adjacent island. The entire square contained fourteen and sixty-nine one-hundredths acres. This left thirty-four one-hundredths

acres as the area existing at that time above ordinary high-water mark, as shown by the patent and the survey upon which it was based.

It is now conceded that by depositing many thousand tons of rock on the submerged land under the shallow water around and contiguous to Mission Rock and the adjacent island, the area has been increased to about 4 acres. It seems from one of the exhibits that this rock was brought to the island in ships as ballast.

The United States is entitled to recover the entire area claimed by the defendant company, that is, the fourteen and sixty-nine one-hundredths acres, because that amount is claimed by the defendant, is held in possession by the defendant, and if necessary to the defendant in order to occupy and use Mission Island, is equally essential to the United States.

If, however, there be submerged land not occcupied or used by the defendant, the United States is certainly entitled to recover the entire area which is occupied and used, including the island as expanded, with the wharves, docks, piers, and all permanent improvements attached to and made a part of the realty. It is quite impossible to separate these from the island as it once stood. To recover the island it is absolutely necessary to recover them. To recover Mission Rock as it once stood would be a victory as barren as the rock itself.

In the leading case of *Martin* v. *Waddell*, 16 Peters, 367 (1843; Taney J.), an action in ejectment was brought to determine the title to land under tide water

in New Jersey. The plaintiff below claimed the land under a grant from the original proprietors, while the defendant based his title upon a New Jersey statute, passed in 1824, giving him an exclusive right to take oysters. The court gave judgment for the defendants under the State grant, holding that the title to the submerged land granted to the original proprietors was a public right, which they received in trust for the people who might settle that territory. Upon the Revolution, this title became vested in the State of New Jersey for the benefit of the people. The principal question in dispute between the parties in this suit, and, indeed, the only one of any value, was the oyster fishery. (*Den* v. *Jersey Co.*, 15 Howard, 426, 432.)

In *Frisbie* v. *McClernin*, 38 Calif., 568 (1869), it was held that ejectment would lie to recover a strip of overflowed land, the use and occupation of which for wharf purposes was granted by the State to the plaintiffs, Sawyer, C. J., saying (p. 571):

> The grantees had an estate in the land, which authorized them to take possession, occupy and control it for the purposes of the grant. They had a right to the possession of the land in order to apply it to the purposes indicated. There was something of which they could be dispossessed, and they were ousted from the possession and occupation.

In *Coburn* v. *Ames* (52 Calif., 385) it was held that in a case where no question of riparian rights intervened, the State, as the owner of lands covered by navigable waters, might maintain ejectment for a

wharf constructed without authority of law below the line of low water (p. 398).

Assuming that the riparian owner is entitled to wharf out to deep water, the court pointed out that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election. If he did not see fit to exercise it, the court held that he could not maintain ejectment to recover the possession of wharves erected by others, simply for the purpose of demolishing them. If obstructed in the exercise of the right of wharfing out, he might maintain an action for damages, and if the obstructions amounted to a public nuisance, it might be abated by an appropriate proceeding.

It is to be observed that this does not apply to the case at bar. There is no existing nuisance here which could be abated, as detached from and not a part of the island. The improvements made are attached to and a part of the land owned by the Government. The only method of obtaining the advantage of the possession and use of Mission Island as it stands now, is an action of ejectment which will give the Government of the United States complete control of the island and the surrounding water.

XI.

As to the action of the Government officer who fixed the harbor or dock lines surrounding Mission Island, that officer acted simply upon the visible facts presented to him. It wasn't his business to inquire into the title of Mission Island. That island, at the time

he fixed this line, was in the occupation of the California Dry Dock Company, which had filled in a certain quantity of submerged land about it, and had constructed or was constructing docks and warehouses. Taking the situation as it was, he fixed the line beyond which they should not fill in. Having no authority to determine questions of title, his action can in no wise be held to estop the Government.

XII.

For a discussion of the relation of President McKinley's order of January 13, 1899, permanently reserving these islands "*for naval purposes*," to section 5 of the act of Congress of July 1, 1864 (13 Stat., 332), I refer the court to the opinion of the circuit court of appeals (Rec., pp. 31 et seq.).

It seems to me that this order of the President may be read without reference to the act of July 1, 1864. If, as the circuit court of appeals held, this act had no relation to Mission Rock and the adjacent islands, "which were and are far outside of the Pueblo grant of lands claimed by and confirmed to the city" (Rec., p. 33), the order of President McKinley may be read, not as a reservation under that act, but as an appropriation of Mission Island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes. I mean, of course, an appropriation, not in the sense of a condemnation for public purposes of private land, but as a designation of the particular public use to which these islands, long set apart

from sale, were to be finally and permanently devoted. (Respecting the authority of the President to set aside parcels of land belonging to the United States for particular public uses, see *Grisar* v. *McDowell* (6 Wall., 363, 381; Opinion Attorney-General MacVeagh, 17 Opin., 160).

The court will observe that in *Grisar* v. *McDowell*, it is stated that the original order of President Fillmore, made November 5, 1850, was modified by a subsequent order made December 31, 1851, the court saying (p. 371):

> He (the President) possessed the same authority in 1851 to modify the reservation of 1850, by enlarging or reducing it, that he possessed to make the reservation in the first instance.

In the view I take of this case, these islands, not being included in the public lands surveyed and thrown open to preemption and sale, were, from the time of the acquisition of this territory from Mexico, reserved and set aside for some public use. The particular use to which the islands were to be devoted was not specified until the order of President McKinley of January 13, 1899, when they were permanently reserved "*for naval purposes.*" The reference made in this Executive order to the official plat on file in the General Land Office did not limit the reservation to the area stated on the plat. The reservation was of "Mission Island and the small island southeast thereof," as they then existed, with all the rights appurtenant thereto, and necessary for their use "for

naval purposes." This included, of course, the right to reclaim the land under shallow water up to the point of navigability, and erect thereon wharves, docks, and piers, where vessels of the United States might land. If a private corporation had without authority filled in the land and constructed permanent wharves, piers, docks, etc., making them a part of the islands, then the reservation operated as an appropriation of these additions to the realty, for reasons before stated.

If there are any equitable claims to compensation on the part of the defendant, growing out of the cost of the improvements made, these may safely be left to the consideration of Congress.

JOHN K. RICHARDS,
Solicitor-General.

FEBRUARY 26, 1903.

APPENDIX.

ACT ADMITTING CALIFORNIA.

(9 Stat., 452.)

CHAP. L.—*An act for the admission of the State of California into the Union.*

Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the President of the United States by message dated February thirteenth, eighteen hundred and fifty, and which, on due examination, is found to be republican in its form of government:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

SEC. 2. *And be it further enacted*, That, until the Representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of California shall be entitled to two Representatives in Congress.

SEC. 3. *And be it further enacted*, That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal *of the public lands* within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the

same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever *upon the public domain* of the United States, and in no case shall non-resident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor: *Provided*, That nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that State.

Approved, September 9, 1850.

THE GRANT.

(Stat. Cal., 1869–70, p. 801.)

AN ACT to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor. (Approved April 4, 1870.)

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Henry B. Tichenor is hereby authorized to have a survey and map made, at his own expense, by the city and county surveyor of San Francisco, *of the lands belonging to the State*, situated in said city and county, and *included within the following boundaries*, to wit: Commencing at a point in the bay of San Francisco, distant three thousand five hundred and seventy (3,570) feet southeasterly from the southerly corner of Brannan and Second streets, as the same are laid down on the official map of said city, said distance being measured along the extension, southeasterly of the southwesterly line of Second street; thence in [a] southwesterly direction, at right angles with said line of Second street extended, five hundred (500) feet; thence at right angles southeasterly eight hundred

(800) feet; thence at right angles northeasterly eight hundred (800) feet; thence at right angles northwesterly eight hundred (800) feet; and thence at right angles southwesterly three hundred (300) feet, to the point of commencement; said tract of land being a square, including the rock known as Mission Rock; and upon the approval of such survey by the surveyor-general, *and the payment by said Tichenor to the State treasurer, of the value of all the lands within said described boundaries which shall be shown by such survey and map to lie below ordinary high-water* mark, at such rate as shall be assessed by the board of State tide land commissioners per acre, and upon the production to the governor of the receipt of the State treasurer, and of a copy of said map, with the certificate of the surveyor-general of his approval thereof, a patent *for said lands* shall be issued to said Tichenor, his heirs, and assigns: *Provided*, That such patent shall not be issued until said Tichenor, his heirs or assigns, *shall have constructed a marine railway or dry dock at said Mission Rock.*

SEC. 2. This act shall take effect and be in force from and after its passage.

THE PATENT.

UNITED STATES OF AMERICA, *State of California.*

To all to whom these presents shall come, greeting:

Whereas under the provisions of an act of the legislature of the State of California, entitled "An act to provide for the sale and conveyance *of certain submerged lands* in the city and county of San Francisco to Henry B. Tichenor," approved April fourth, eighteen hundred and seventy, the sale and conveyance to the said Henry B. Tichenor of the tract of land hereinafter described was authorized and directed upon certain

conditions therein recited; and whereas, the said recited conditions, to wit, a survey and map made, at his own expense, by the city and county surveyor of San Francisco; payment to the State treasurer of the value of all the lands within said described boundaries, at the rate assessed by the board of State tide land commissioners per acre; the production of the receipt of the State treasurer, and a copy of said map with the certificate of the surveyor-general of his approval thereof; and the construction of a marine railway or dry dock at Mission Rock, have been fully complied with by the said Henry B. Tichenor,

Now, therefore, in the name and by the authority of the people of the State of California, and by virtue of authority in me vested, I, Newton Booth, governor, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto Henry B. Tichenor, all the following-described lands, to wit: A fraction in the west half of section eleven (11), township two (2) south, range five (5) west, base and meridian of Mount Diablo, and more particularly described in the field notes of said survey, as follows: Commencing at a point in the bay of San Francisco distant three thousand five hundred and seventy (3,570) feet southeasterly from the southerly corner of Brannan and Second streets, as the same are laid down on the official map of said city, said distance being measured along the extension southeasterly of the southwesterly line of Second street, and running thence south 45 degrees west five hundred (500) feet; thence south 45 degrees east eight hundred (800) feet; thence north 45 degrees east eight hundred (800) feet; thence north 45 degrees west eight hundred (800) feet; thence south 45 degrees west three hundred (300) feet to the place

of beginning, said tract of land being a square, including the rock known as Mission Rock, *and containing fourteen and* $\frac{35}{100}$ *acres exclusive of said rock*, to have and to hold unto him the said Henry B. Tichenor, his heirs and assigns forever.

[SEAL.] In testimony whereof, I, Newton Booth, governor of the State of California, have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand, at the city of Sacramento, this the eleventh day of July, in the year of our Lord one thousand eight hundred and seventy-two.

NEWTON BOOTH,
Governor of State.

Attest: DRURY MELONE,
Secretary of State.

O